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IN THE

Supreme Court of the United States

October Term, 1982

FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarily situated, collectively and as a class,

Petitioners,

v.

EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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September 15, 1982

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QUESTIONS PRESENTED

1) Whether the Temporary Emergency Court of Appeals ("TECA") has jurisdiction to review a declaratory judgment of a district court which, applying state law, interprets the private rights of parties under a contract where the federal energy regulations expressly provide that the issue is one of private contract governed by state law?

2) Whether TECA has correctly construed, in disregard of the District Court's explicit finding that state law would require the contrary result, federal regulations (stated by the specialized administrative agency to be neutral as regards the distribution of imputed stripper oil) to require an affirmative contractual provision in order for preunitized stripper well property owners to receive a greater than *pro rata* share of the Unit's imputed stripper well production?[1]

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[1]Although no longer a stated consideration under Rule 17 for granting certiorari, TECA's complete disregard of the District Court's expert construction of state law is one indication of TECA's unjudicial treatment of the litigation. Another indication is TECA's misreading of the District Court's judgment. TECA relied on the fiction that the petitioners admitted the Unit production formula controlled the allocation of lower and upper tier oil (App. A-14). This is untrue. Petitioners never admitted the correctness of the allocation of upper and lower tier oil. Petitioners were, rather, unable to contest the allocation; they did not have the necessary information (historical BPCL and production histories of all the tracts which form the Unit) that would have been required to attempt an allocation of prices different from that actually employed by named petitioners. Only Marathon, the unit operator, had the information necessary to allocate prices for lower tier and upper tier oil. The existence of imputer stripper oil, on the other hand, is solely a function of the individual properties which were aggregated to form the Unit. Hence, the named petitioners were able to determine, without reference to the rest of the Unit, the amount of imputed stripper oil attributable to their Tract 117. Furthermore, as petitioners established in the court below, the allocation of lower and upper tier oil involves numerous special considerations not applicable to the present stripper oil controversy.

PARTIES

The parties to the proceedings in this action are the working interest and royalty interest owners in the Yates Field Unit, located in Pecos and Crockett counties, Texas. Francis Oil & Gas, Inc., Curtis S. Green, Dave R. Sylvan, George D. Daly, George B. Kaiser and Don H. Nelson were designated representatives of the plaintiff class, defined by the District Court below (and as requested by the respondents) to be:

> "All persons who own an interest in the Yates Field Unit who would derive an economic benefit in their capacity as Unit participants from the allocation of Unit production to their respective tracts on the basis advocated or utilized by the interest owners in Tract 117."

Exxon Corporation and Marathon Oil Company were designated representatives of the defendant class, defined by the District Court below (and as requested by the respondents) to be:

> "All persons who own an interest in the Yates Field Unit who would not derive an economic benefit in their capacity as Unit participants from the allocation of Unit production to their respective tracts on the basis advocated or utilized by the interest owners in Tract 117."

The unnamed members of the classes known to the named parties were identified in papers filed pursuant to Rule 21(c) of the Rules of the Temporary Emergency Court of Appeals. The petitioners stand ready to provide such documentation to the Court should the Court deem it advisable.

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FRANCIS OIL & GAS, INC., CURTIS S. GREEN, DAVE R. SYLVAN, GEORGE D. DALY, GEORGE B. KAISER and DON H. NELSON, individually and on behalf of all other persons similarily situated, collectively and as a class,

Petitioners,

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EXXON CORPORATION and MARATHON OIL COMPANY, individually and on behalf of all other persons similarily situated, collectively and as a class,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners pray that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered on August 16, 1982 in this case.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals will be reported at ____ F.2d ____ (TECA 1982), and is reproduced as Appendix A-1 to A-15. The Judgment of the Temporary Emergency Court of Appeals is reproduced as Appendix B, at p. A-16. The Amended Summary Judgment entered by the District Court is not officially reported and is reproduced as Appendix C, pp. A-17 to A-26.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on August 16, 1982. No petition for rehearing has been filed. The jurisdiction of this Court is invoked pursuant to 12 U.S.C. App. 1904, §211(g) and 15 U.S.C. §754(a) (1).

STATUTORY AND REGULATORY PROVISIONS

12 U.S.C. App. 1904, §211(b) (2):

> "Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of a judgment by the district court.

10 C.F.R. §212.75(b)(2) (repealed, 46 Fed. Reg. 20508 [April 3, 1981]) states, in pertinent part[2]

> "imputed stripper well crude oil means, (1) with respect to a unitized property for which a unit base production control level was established prior to August 1, 1977, in a particular month, a number of barrels of crude oil equal to the total number of barrels of crude oil (excluding condensate recovered in non-associated production) produced during the 12-month period immediately preceding the establishment of a unit base production control level for the unitized

[2]Most of the crude oil regulations were revoked by President Reagan's decontrol of crude oil and refined petroleum products on January 30, 1981. Executive Order 12287, 46 Fed. Reg. 9909. The Department of Energy then formally repealed the regulations on April 3, 1981. 46 Fed. Reg. 20508. The stripper well categorization retains continuing national significance due to the favored tax treatment of stripper well oil in relation to most other oil categories under the Crude Oil Windfall Profits Tax of 1980, 26 U.S.C. §4987, 4991.

property from all stripper well properties (qualified as such as of the establishment of a unit base production control level for the unitized property) that constitute the unitized property, divided by the number of days in that 12-month period, and multiplied by the number of days in that particular month."

41 Fed. Reg. 4931, 4937 (February 3, 1976):

"Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation is more properly a matter for private resolution among participants of the unit agreement."

STATEMENT

A. STATEMENT OF THE CASE

This current action was originally filed in Texas state court as a bilateral class action.[3] The named respondents removed the action to the United States Distict Court for the Western District of Texas on the basis of diversity of citizenship and federal question jurisdiction, whereupon the District Court certified this action as a bilateral class action.[4]

On February 19, 1981, the named petitioners filed their Motion for Summary Judgment. Extensive discovery was conducted and completed. Exxon and Marathon filed a cross motion for summary judgment on or around

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[3]Professor Moore has coined the phrase "bilateral class action" to define a class action with both plaintiff and defendant classes. 3B *Moore's Federal Practice*, ¶ 23.40[6] at p. 23-311.

[4]Significantly, the district court only ruled that it had jurisdiction based on diversity of citizenship grounds. Amended summary judgment, App. C., undisputed fact No. 12 at A-25.

September 24, 1981. After receiving extensive briefs on the issues presented to this Court, and after hearing oral argument on the parties' motions for summary judgment, the District Court granted the named petitioners' Motion for Summary Judgment.[5]

The District Court squarely based its decision on state contract law. The District Court held that the Unit Agreements allocate only production, and not the prices or proceeds of sale.[6] The District Court also held that, as a matter of state contract law, the stripper well pricing benefits after unitization belong to the individual tracts giving rise to the benefits and are not allocated to other tracts unless there is a specific contract provision allocating the pricing benefits in some other manner. Simply stated, the District Court held that the pricing attributes of crude oil are not "unitized substances" within the meaning of the Unit Agreements. Because, under Texas state law, the Unit Agreements allocate only production, and not the prices or proceeds of sales, the District Court held that the intent of the parties under the Unit Agreements was to leave the benefit of stripper well pricing with the plaintiff class, your petitioners.

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[5]By requesting summary judgment, the petitioners did concede that no issue of fact existed under the theory that the petitioners were advancing. On the other hand, the petitioners did not concede that no issues remain in the event that the respondents' theory would be adopted. 6 *Moore's Federal Practice*. ¶ 56.13 at 56-341 to 56-345, 10 Wright & Miller, *Federal Practice and Procedure*, §2720 at pp. 459-467. The respondents' theory relied heavily on unsupported assertions of purported and nebulous industry practice and understanding. The unsupported allegations of industry practice and understanding were denied by the petitioners in deposition testimony. TECA was therefore patently incorrect in directing that summary judgment be entered in favor of the respondents. Basic issues concerning the construction of the Yates Field unit agreements remained after TECA's disposition.

[6]The amended summary judgment on February 4, 1982 made clear that the summary judgment was entered on behalf of the plaintiff class, and not simply on behalf of the named plaintiffs. The amended order also corrected a typographical error

The respondents then perfected dual appeals to the Temporary Emergency Court of Appeals ("TECA") and to the United States Court of Appeals for the Fifth Circuit.[7]

On appeal, TECA reversed the District Court's award of summary judgment to petitioners and directed that summary judgment be entered in favor of the respondents. Over petitioners' objections, TECA upheld its jurisdiction to review the District Court's judgment and held that the act of unitization deprived the prior tract owners of any right to certify their tract's pre-unitized level of stripper oil *unless* a specific provision in the unitization document so gave them the right. TECA then stated that the under Texas law, no clause in the Yates Field Unit agreements preserved the petitioners' rights to so certify the imputed stripper oil.

B. STATEMENT OF THE FACTS

The Yates Field Unit is located in Pecos and Crockett Counties, Texas. The named petitioners are the owners of oil and gas produced from the oil and gas leases located within Tract 117 of the Yates Field Unit. Prior to unitization of the Yates Field, the named petitioners had sold their oil, through the tract operator Kaiser-Francis Oil Company, to Exxon. Forty barrels of daily oil production from Tract 117 qualified for stripper status at the time of unitization.[8]

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[7]The Fifth Circuit has stayed further proceedings in Appeal No. 82-1088 pending resolution of the TECA appeal.

[8]Stripper crude oil, at all times relevant to this controversy, was generally defined as crude oil produced from a property whose average daily production did not exceed 10 barrels per well during a designated qualifying period. 15 U.S.C. §757 (i)(2). The price of stripper oil was uncontrolled, except for a period from February to September 1976, where the price of stripper oil was controlled at the upper tier level. 10 C.F.R. §212.54, repealed 46 Fed. Reg. 20508 (April 3, 1981).

Marathon Oil Company was the primary mover behind unitization of the Yates Field Marathon, with an eventual 49.480235% interest in the Unit, was the principal drafter of the Unit Agreements. The Unit Agreements, as drafted by Marathon and executed by a small group of insiders, underwent only slight modification when later submitted for approval by the other unit participants.

Marathon submitted the Unit Agreements for comments by a letter dated December 10, 1974 to only a favored few major working interest owners in the Yates Field.

Marathon's December 10, 1974 letter enclosed copies of the Unit Agreements and invited the addressees to a meeting to be held on December 16, 1974. Marathon's December 10, 1974 letter was not sent to named petitioners.

Marathon knew at the time of the December 10, 1974 mailing that George B. Kaiser, acting as tract operator, had specifically requested (in a letter dated October 28, 1974 to Marathon) to be included on Marathon's mailing list for all future correspondence. Despite Mr. Kaiser's clear request, Mr. Kaiser was not included on the mailing list and consequently was not in attendance at the initial working interest meeting held on December 16, 1974. Nor did Mr. Kaiser receive a copy of the summary of the December 16, 1974 meeting.

Instead, Mr. Kaiser received a Marathon letter dated January 16, 1975 which presented a *fait accompli* to the named petitioners. The January 16 letter stated:

> "A method for establishing tract participation has been developed which has proved to be acceptable to a vast majority of the operators .... We believe these agreements in their present form are acceptable to an overwhelming number of operators and that we will soon be able to put them in form for execution."

The withheld summary of the December 16, 1974 meeting confirmed the *fait accompli* of the determination of the participation factor assigned the named petitioners. The economic realities of the Yates Field left the named petitioners with no choice but to ratify the Yates Field Unit Agreements.

The Yates Field Unit became fully operational on July 1, 1976 when Marathon, the unit operator, established the Unit's Base Production Control Level ("BPCL"). Commencing with the month of July, 1976 and ending with the month of September, 1980, the named petitioners have sold Exxon all the oil allocated to Tract 117.[9] The named petitioners, pursuant to regulation, certified to Exxon each month the amount of old oil, new oil and stripper oil which the named petitioners were selling.[10] In accordance with the Yates Field Unit Agreements, the name petitioners certified the Tract 117 oil qualified for stripper well pricing benefits.

Exxon totally ignored the named petitioners' certifications. Exxon's payments were determined from calculations based on certain information provided by Marathon, the unit operator. This information included the

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[9]The named petitioners did not continue selling their oil to Exxon after the stripper well pricing controversy started by choice. The named petitioners were effectively required to sell their oil to Exxon by federal regulation. See former 10 C.F.R. §211.63(a). When that regulation was amended in September 1980 to exclude purchases by "majors" from coverage, the named petitioners promptly discontinued selling their oil to Exxon and found a new purchaser willing to pay the named petitioners pursuant to the named petitioners' lawful certifications.

[10]In general, the quantity of oil produced during the twelve month period preceding the establishment of the unit constituted the unit's BPCL. Generally, all production at or below a unit's BPCL was deemed "old" oil, while quantities in excess of the unit BPCL qualified as new oil. New oil qualified for a higher price than old oil. 10 C.F.R. §212.75(b), 41 Fed. Reg. at 4941. The regulation further provided a special rule for units established before August 1, 1977 permitting continued qualification for stripper well production derived from tracts in the unit during the year preceding unitization. The sum of all such production was defined as the unit's "imputed stripper well crude oil." 10C.F.R. §212.75(b).

Unit's monthly production, BPCL, and total unit amounts of stripper oil, upper tier oil and lower tier oil. Exxon used the tract participation formula set forth in the Unit Agreement which specified participation based on the producer's tract size relative to the size of the whole unit. Exxon allocated the benefits of stripper well pricing among all unit participants in the same percentages as was otherwise provided by the tract participation formula for the allocation of crude oil production. The result of the use of the tract area formula was that the amount of stripper well oil allocated to the named petitioners was considerably smaller than the actual amount of stripper oil certified by the named petitioners to the defendant Exxon. Marathon explicitly denied making any certifications to Exxon as to Tract 117 oil.

The crude oil allocated by the Unit Agreement to Tract 117 was received in kind and separately and independently marketed by the named petitioners.

When this controversy first arose[11] Exxon sought an opinion of the Department of Energy that Marathon was

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[11]The controversy between the named petitioners and Exxon resulted in two other federal court actions and one state court action. In the first federal action, Francis Oil & Gas, Inc. ("Francis") sued Exxon for the difference in amounts paid by Exxon to Francis and the amount certified by Francis. *Francis Oil & Gas, Inc. v. Exxon Corporation,* No. 77-C-161-D, Northern District of Oklahoma. Before a ruling on the merits of the *Francis* action could be obtained, Exxon filed a Motion for Judgment on the Pleadings for Failure to Join Indispensable Parties. Exxon contended that the suit by Francis against Exxon for breach of contract really involved a construction of the provisions of the Yates Field Unit Agreement and the Yates Field Unit Operating Agreement and that, therefore, all the working interest owners in the Yates Field Unit were indispensable parties. Working interest owners representing 1.352535 percent of the total working interest ownership were Oklahoma citizens. Exxon claimed that diversity jurisdiction would not lie and that the cause would have to be dismissed. The District Court, in a written order, agreed with Exxon. The District Court was reversed by the United States Court of Appals for the Tenth Circuit *Francis Oil & Gas, Inc. v. Exxon Corporation,* 661 F.2d 873 (10th Cir.

the proper party to certify production from Tract 117. The Department of Energy rejected Exxon's request and opined that the named petitioners were the proper certifying parties. Furthermore, the Department of Energy expressly opined that the issue whether the named petitioners or the other unit participants were entitled to the stripper well pricing benefits was a question of the private contractual agreements of the parties to be decided by state law.

REASON FOR GRANTING THE WRIT

A. Conflict with decisions of other Courts of Appeal: This Court should grant certiorari because the TECA decision expanding its jurisdictional grant is in conflict with decisions from the Second Circuit and Fifth Circuit, as well as in conflict with prior TECA decisions. Supreme Court Rule 17(a). Prior to the TECA decision, the courts of appeal had been agreed on the parameters of TECA jurisdiction:

> "for purposes of determining TECA jurisdiction, what is determinative is not whether an EPAA question exists but whether an EPAA question has been adjudicated." *Texaco Inc.* v. *Department of Energy*, 616 F.2d 1193, 1198 (TECA 1979).

1981). The case is now pending before the District Court for the Northern District of Oklahoma on Francis' Motion for Summary Judgment.

The second federal suit was filed by the named petitioners other than Francis Oil & Gas, Inc. against Exxon under the same breach of contract theory. *Curtis S. Green et. al. v. Exxon Corporation*, No. 79-C-444-E, Northern District of Oklahoma. The *Green* case had been abated by the District Court, pending resolution of the *Francis* appeal by the Tenth Circuit. The *Francis* appeal having been resolved, the *Green* case is now pending on a Motion for Summary Judgment against Exxon Corporation.

A state court action was brought in Texas against Exxon by the named petitioners, as a consequence of the *Francis* dismissal. *Francis Oil & Gas, Inc. et al v. Exxon Corporation*, No. 4141, 83rd Judicial District, State of Texas. Exxon filed a Motion to Abate pending the resolution of the action now before this Court. There has been no other action taken in the Texas state action.

> "What is determinative . . ., is not the existence of an ESA issue, but whether the ESA issue has been adjudicated." *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979); *see* also, *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981).

In the past, in determining jurisdiction, TECA looked "only to the nature of the issue on appeal and not to the nature of the underlying case or controversy." *Gulf Oil Corp.* v. *Department of Energy*, 639 F.2d 766, 767 (TECA 1981). In other words, TECA's jurisdiction was one of "issue jurisdiction"—TECA would only decide federal energy issues on appeal, and would leave the non-federal issues to the regular courts of appeal for adjudication. The second and fifth circuits explicitly adopted TECA's approach. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2nd Cir. 1979); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981). Inexplicably, TECA choose to repudiate its past precedents[12] in this case and decide issues specifically adjudicated by the District Court under state law.

As hereafter discussed, the issue decided by the District Court was an issue explicitly left by the federal regulations to be decided by private - that is state - contract law. No "EPAA" issue was therefore decided; the jurisdictional prerequisite to the TECA appeal was missing, as TECA's jurisdiction is founded exclusively on the provisions of the Economic Stabilization Act, 12 U.S.C. §1904 note

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[12] *See e.g., United States v. Zang*, 653 F.2d 493 (TECA 1981), *cert. denied* ____ U.S. ____, 102 S.Ct. 323 (no jurisdiction over appeals from convictions of conspiracy, mail fraud and racketerring despite the fact that criminal offenses arose out of violations of Emergency Petroleum Allocation Act regulations); *Spinetti v. Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975) (no jurisdiction over counts alleging antitrust and fair trade action violations); *Atlantic Richfield Co. v. Department of Energy*, 655 F.2d 227 (TECA 1981) (no jurisdiction over state law issues); *United States v. Cooper*, 482 F.2d 1393 (TECA 1973) (no jurisdiction over convictions for fraudulent misrepresentations); *Texaco Inc. v. Department of Energy*, 616 F.2d 1193 (TECA 1979) (no jurisdiction over issue arising under Department of Energy Organization Act).

[Economic Stabilization Act, §211(b) (2)] and of the Emergency Petroleum Allocation Act, 15 U.S.C. §754. *Atlantic Richfield Co.* v. *Department of Energy*, 655 F.2d 227, 233 (TECA 1981).

It is clear that the issue decided by the District Court was *not* an EPAA issue, but was rather an issue of state law. The District Court resolved the issue of allocation of stripper well pricing benefits among participants in a unit agreement. The federal regulations are clear that the allocation of stripper well pricing benefits is a matter of state law:

> "Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation is more properly a matter for private resolution among participants of the unit agreement." 41 Fed. Reg. 4931, 4937 (February 3, 1976), 5 Energy Mgmt. Rep. (CCH) ¶40, 257 at 40,426.

Exxon has already attempted to convert this contract dispute into a regulatory one by seeking, subsequent to the commencement of litigation between the parties, an interpretation by the Department of Energy ("DOE"). The DOE rejected Exxon's attempt. The DOE expressly and specifically confirmed that this dispute is a matter of Texas state law:

> "Moreover, Exxon's question relating to the validity of Francis' certifications in reference to the proportion of crude oil claimed by Francis *is a matter that state law must resolve, based upon the written and oral agreements and understandings of the participants in the Yates Field Unit.*" (Department of Energy Response to Exxon Request for Interpretation, dated March 22, 1978 (emphasis added).[13]

[13]The Department's letter is reproduced as Appendix D to this Petition, pp. A-27 to A-30.

The District Court carefully noted that "both parties agree that the FEA intended the allocation of imputed stripper oil is a matter left to private agreement which is controlled by state law". (Amended Summary Judgment, App. C at A-20). Pursuant to that understanding, the District Court first examined the Unit Agreements in light of Texas *state* law to determine the intent of the parties. The District Court concluded that "the unit agreement does not purport to control allocation of proceeds." (Amended Summary Judgment, App. C at A-19).[14]

The District Court then reviewed the federal energy regulations for the sole purpose of determining whether those regulations changed the outcome dictated by state law. As a matter of state law, the District Court had determined that the Unit Agreements did not allocate proceeds, that is, the pricing categories of crude oil. An examination of the federal regulations led the District Court to the obvious conclusion that the regulations did not change what state law would otherwise hold: the petitioners retained the exclusive right to market the crude oil allocated

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[14]That the District Court's analysis was premised on state law is made manifest in its opinion:

> Both parties agree that the FEA intended that the allocation of imputed stripper oil is a matter left to private agreement which is controlled by state law. The parties disagree, however, as to whether it was incumbent on Plaintiffs to specifically reserve their original stripper rights to themselves or whether it was incumbent on Defendants to specifically impute Plaintiffs' stripper pricing rights to all the other interest owners in the unit. (Amended Summary Judgment, App. C. at A-20)

The District Court went on to conclude that state law imposed upon the respondents the burden of specifically imputing stripper pricing rights to all the other interest owners in the unit. Federal regulations were examined only to the extent necessary to determine that these regulations did not pre-empt otherwise clear and controlling state law. TECA, on the other hand, concluded that the DOE did not mean what it said and concluded that federal law places the burden on the petitioners. This was an important, albeit totally erroneous, decision of federal law and constitutes an independent reason for this Court granting certiorari. See, *infra*, at pp. 14 to 18.

to their tracts.[15] The District Court then concluded its analysis:

> "The pricing benefits of stripper oil were *not unitized and thus were not imputed to the remainder of the interest owners in the unit.*" (Amended Summary Judgment, App. C at A-21). (emphasis added)

The regulatory history is clear that the FEA did not intend to alter state law in the allocation of these pricing benefits.

That TECA's decision is in conflict with decisions of other circuits is best illustrated by the Fifth Circuit decision in *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981). The Fifth Circuit was considering whether prosecutions for RICO violations, alleged mail fraud, commercial bribery and other criminal offenses arising out of the defendants' attempts to miscertify old and new oil were within the exclusive appellate review of TECA. The Fifth Circuit concluded that the Fifth Circuit, not TECA, had jurisdiction, analyzing that:

> "The crucial question is whether the case involves issues that must be decided by TECA in order that 'uniform interpretation of the substantive provisions of the' statute may be achieved." *Id.*, 646 F.2d at 951.

See also, *Bray* v. *United States*, 423 U.S. 73, 74 (1975). It is clear that uniform interpretation is not desired in this case. The administrative agency has explicitly made a policy decision to permit state private contract law to govern the

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[15] TECA was therefore incorrect in asserting:

> "Ironically, the district court's ruling (based on its interpretation of the regulations) that only the pre-unitization stripper well property owners retained the imputed exemption was itself an allocation to particular participants; a decision the FEA stated was to be left to private resolution." App. A at A-14.

TECA's misreading of the District Court's judgment significantly contributed to TECA's unwarranted assertion of jurisdiction.

allocation of stripper well pricing benefits under a unitization plan. That policy choice necessarily permits and indeed demands a non-uniform interpretation. The federal policy affirmatively demands that the unit participants, rather than federal law, determine the issue by private contract.[16]

TECA's assertion of jurisdiction in this case is therefore directly in conflict with the Second Circuit's decision of *Coastal States Marketing, Inc., supra,* and the Fifth Circuit's decision of *Uni Oil, Inc., supra.* TECA's statement that "this dispute can be resolved only through an interpretation of the regulations and that such an interpretation will control the litigation" (App. A at A-7) is so patently incorrect as to be a departure of jurisdictional magnitude from its prior precedents. The District Court carefully heeded the Department of Energy's advice that the allocation of stripper oil in a unit is a matter of *private contract,* not federal energy law. TECA in essence held that any case having an "EPAA issue" is within its jurisdiction.[17] This Court should grant certiorari in order to resolve this conflict and to authoritatively delineate TECA's jurisdiction.

B. Important question of federal law: This Court should grant certiorari because TECA has decided an important question of federal law which has not been settled by this Court. Supreme Court Rule 17(c). As discussed earlier, *supra* at pp. 9 to 14, TECA construed the imputed stripper oil regulations to require an affirmative contractual

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[16]The Fifth Circuit is the appellate court of expertise insofar as the interpretation of Texas state law is concerned, having appellate jurisdiction over Texas federal district court orders and judgments. See 28 U.S.C. §41.

[17]TECA's rationale for its jurisdictional assertion is strikingly identical to the position once espoused by the Tenth Circuit in disclaiming jurisdiction and subsequently rejected by this Court in *Bray v. United States*, 423 U.S. 73 (1975).

provision in order for the pre-unitized stripper tract owners to individually avail themselves of the imputed stripper oil pricing.[18] In so construing the federal regulations, TECA completely disregarded the Department of Energy's own interpretation of its regulation. Specifically, TECA held:

> As we have seen, the imputed stripper well exemption in fact was an attempt by the federal agency to prevent the total loss of credit for production from previously marginal properties. This does lead, however, to the question that ultimately separates the parties in this case; how should the unit's imputed stripper well exemption be allocated among the participants?
>
> It is in this respect that the federal regulations were intended to be neutral. The preamble to section 212.75, immediately following the description of the imputed stripper well exemption, states:
>
> > Although some comments suggested that FEA prescribe the method for allocating this quantity of upper tier crude oil among the participating leases, FEA has determined that this allocation [is] more properly a matter for private resolution among participants of the unit agreement.
>
> 41 Fed. Reg. at 4937. What FEA envisioned is readily apparent: preserving the possibility of a stripper well exemption would remove any disincentive to unitization on the part of owners of stripper well properties; and these owners could

[18]On the other hand, under Texas state law, the Unit Agreement (and the intent of the parties to it) required the contrary result. The District Court reviewed all the evidence and found the position of respondents totally at odds with the contract and the understanding of the parties. TECA, in reversing the District Court, has pre-empted and reversed state law, despite the Department of Energy's express mandate that federal law be neutral.

> use the prospect of an imputed exemption as a bargaining chip to negotiate favorable terms in the unit agreement." App. A at A-13, 14.

TECA's definition of "neutral" in context of the imputed stripper oil regulation turns the regulation on its head.[19] The regulation was adopted to eliminate a perceived significant disincentive for stripper well owners to consent to unitization. Without the special provision, the creation of a unit would have destroyed the "stripper well property" quality of individual tracts through aggregation of production, threatening the loss of higher prices available as stripper well oil. 41 Fed. Reg. 4931 at 4936-7 (February 3, 1976), 5 Energy Mgmt. Rep. (CCH) ¶ 40,257 at 40,426. The regulation was obviously intended to be an inducement to the stripper tract owners to consent to unitization. TECA's opinion makes that consent hazardous absent an express negotiated provision granting the preunitized stripper tract owners the stripper well pricing benefits. It would be perverse to construe the regulation to reward the unit which

[19]Unfortunately TECA's treatment of the "neutral" issue is not unique in its misunderstanding of the relevant regulations. In footnote 7 of its opinion, TECA notes that the named petitioners only sought to certify 40 barrels of imputed daily oil production as stripper, rather than their total imputed quantity, and thought that undermined the petitioners' case. *TECA's observation, coming from a court ostensibly having expertise in this area, is ludicrous.* Petitioners were specifically limited to a daily stripper certification of 40 barrels (the amount of stripper oil Tract 117 produced daily before unitization) by 10 C.F.R. §212.75(b)). §212.75(b) restricted imputed stripper oil in units formed before August 1, 1977 (such as the Yates Field Unit) to the amount of stripper oil produced from the tracts constituting the unit prior to unitization. See discussion, 43 Fed. Reg. 33694 (Aug. 1, 1978), [1974-1981 Transfer Binder-Regulation Preambles] Energy Mgmt. Rep. (CCH) ¶ 42 383, at p. 40,929. Far from undermining petitioners' position, the named petitioners' consistent and correct application of the certification rules undermines TECA's incredible opinion and judgment.

contains sripper tracts at the expense of this stripper tracts, yet TECA's opinion does precisely this. It arbitrarily imposes the negotiating burden on the stripper tract owners, not upon the unit which stands to benefit from inclusion of the tract within its coverage. *The Department of Energy expressly declined to adopt this postion.* Rather, it elected to have state contract law decide the allocation issue.

The Department of Energy authoritatively stated its interpretation of its own regulation when it refused Exxon's Request for an Interpretation:

> "...Exxon's question relating to the validity of Francis' certifications in reference to the proportion of crude oil claimed by Francis is a matter that state law must resolve, based upon the written and oral agreements and understandings of the participants in the Yates Field Unit." (Response of the Department of Energy of March 22, 1978, App. D at A-29).

As been shown *supra,* at pp. 9 to 14, the District Court meticulously followed the Department's interpretation. The District Court examine *state* law and determined that under *state* law, the plaintiff class was entitled to prevail on summary judgment. TECA choose to reverse the District Court's interpretation of state law in the guise of interpreting the meaning of the regulation's neutrality.

Furthermore, TECA misunderstood the District Court's holding. The District Court did not hold that the federal regulations left the imputed exemption to the pre-unitization stripper tract property owners. As is clear from the District Court's judgment, the District Court held that *Texas contract law* would allocate to the pre-unitization stripper tract property owners the imputed exemption under the particular unit agreements involved in the case.

TECA's misunderstanding of the District Court's judgment significantly contributed to its erroneous perception that the federal regulations were crucial to the District Court's reasoning.

TECA's construction of the imputed stripper oil regulation negates the Department of Energy's clear intention that state law determine the allocation of imputed stripper oil. Under TECA's analysis, the federal regulations create a presumption of allocation among all unit participants, rebuttable only by a clear contractual stipulation to the contrary. Justice Brandeis could have been describing TECA's concept of neutrality when he was said to have commented:

> "Neutrality is at times a graver sin than belligerence." quoted in Goldman, ed., *The Words of Justice Brandeis.* (1954).

As TECA's interpretation of the imputed stripper oil regulation presents issues of national economic importance, this Court should grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for briefing and argument this term.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, J. Michael Medina, certify that on this 15th day of September, 1982 placed in the United States mail at Washington, D.C. three true and correct copies of the above and foregoing Petition for a Writ of Certiorari, with correct postage prepaid thereon, addressed to:

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